

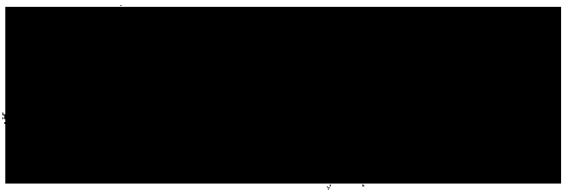


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: SRC 99 002 52255

Office: Texas Service Center

Date: AUG -4 2000

IN RE: Petitioner:  
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER



Public Copy

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prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary as a wine catering manager for a three-year period. The director determined the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel states that the Service should continue to follow the guidance provided by the Matter of Sun, 12 I&N Dec. 535 (Dist. Dir. 1966), in which the profession of hotel manager was found to be a profession requiring at least a baccalaureate degree. Counsel argues that the director misinterpreted the Occupational Outlook Handbook in finding that a baccalaureate degree is not necessary for a position of this type. Counsel requests that the decision be reversed and H-1B visa status be granted to the beneficiary.

The findings in Matter of Sun, *supra*, were effectively superseded by the statutory language of section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b). The law now provides, in part, for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record shows that the beneficiary completed a two-year course of study at the [REDACTED] in the Philippines with the title of Hotel and Restaurant Management in 1973. An educational evaluation submitted by the petitioner indicates that he has earned the equivalent of a bachelor's degree in Hospitality Management with a specialization in Food and Beverage Management granted by an accredited American college or university. However, the record does not show that he holds a baccalaureate degree or its academic equivalent in any field of study. Accordingly, the petitioner has not shown that the beneficiary qualifies to perform the duties of a specialty occupation based upon education alone.

The record shows that from March 18, 1979 to 1983, and from 1986 until 1987, the beneficiary was employed as a waiter. From November

18, 1991 to September 22, 1997, he was employed as a "winekeeper" aboard a cruise ship. However, the petitioner has not shown that this experience was earned in a specialty occupation or that it is sufficient to overcome the beneficiary's educational deficiencies. The beneficiary is not a member of an organization whose usual prerequisite for entry is a baccalaureate degree in a specialized area. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes him to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform services in a specialty occupation.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The duties of the offered position are listed as being responsible for the management of the wine service for all the firm's special

events in South Florida. The essential functions of the position include:

Plan and direct the function of administration and planning of the Food and Beverage Areas to meet the daily needs of the operation.

Clearly describe, assign and delegate responsibility and authority for the operation of the various food and beverage services.

Develop, implement and monitor schedules for the catering operations to achieve a profitable result.

Participate with the Chef and General Manager in the creation of attractive menus and promotions designed to cater to predetermined customer market.

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Identify, create and implement public relations opportunities, e.g. charity.

Implement effective control of food, beverage and labor costs.

Assist the General Manager in establishing and achieving predetermined profit.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

In these proceedings, the duties of the position are dispositive and not the job title. The duties listed above are primarily those of a restaurant and food service manager. The Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at pages 76-78 finds no baccalaureate degree requirement in a specialized area for employment as a restaurant and food service manager. While a bachelor's degree in restaurant and food service management provides a particularly strong preparation for a career in these positions, most of them are filled by promoting experienced food and beverage preparation and service workers. In view of the foregoing, it is concluded that the petitioner has not demonstrated

that the offered position is a specialty occupation within the meaning of regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.